

#352

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of Southern California Edison Company (U 338-E) for Order Approving Proposed Settlement Agreement Regarding QFID 2014 (NP Cogen) and Authorizing Edison's Recovery of Payments Made Under the Proposed Settlement Agreement.

Application 01-11-033
(Filed November 21, 2001)

O P I N I O N

**DECISION APPROVING SOUTHERN CALIFORNIA EDISON COMPANY'S
PROPOSED SETTLEMENT AGREEMENT WITH NP COGEN, INC.**

Summary

This decision approves Southern California Edison Company's (Edison) application for its proposed Settlement Agreement with NP Cogen, Inc. (NP Cogen), and authorizes Edison's recovery of payments under the Settlement Agreement.

Background

On May 21, 1984, Edison executed an Interim Standard Offer No. 4 contract with FPB Cogeneration, Inc., NP Cogen's predecessor, with a term of 20 years. The contract was a standard form firm capacity power purchase agreement providing 20 megawatts (MW) of power, of which 18 MW is firm power, paid at short-run avoided cost (SRAC), and a fixed \$123/kilowatt-year

for capacity. Edison states that due to a number of factors related to the energy crisis, in late 2000 and early 2001, Edison suspended payments to various Qualifying Facilities (QFs) including NP Cogen. Suspended payments for NP Cogen encompass the period from November 1, 2000 through March 16, 2001, when NP Cogen ceased operating its project. A total of \$8,423,208 in energy and capacity payments was withheld from NP Cogen. On March 19, 2001, NP Cogen provided written notice it was canceling the contract in light of the suspension of payments.

On March 27, 2001, we issued Decision (D.) 01-03-067, which revised the factor in the SRAC formula, changed the SRAC gas index, and ordered utilities including Edison to resume payments to QFs. On March 28, 2001, NP Cogen filed an action against Edison in Los Angeles County Superior Court¹ seeking judicial declaration that Edison's suspension of payments constituted a material breach of the contract entitling NP Cogen to terminate the contract. NP Cogen claimed damages of approximately \$8.4 million, and unspecified consequential damages. Edison disputed NP Cogen's assertion and this matter was consolidated with other actions in Los Angeles Superior Court. Although the Superior Court judge dismissed all of the coordinated actions on September 13, 2001, NP Cogen appealed the dismissal order.²

Edison states that it began negotiations with QFs, including NP Cogen, regarding suspended energy payments, litigation, and other related issues shortly after suspension of payments. The negotiations yielded two settlement

¹ *NP Cogen, Inc. v. Southern California Edison Company*, Case No. BC247632.

² Qualifying Facility Cases, Superior Court of California, County of Los Angeles, Judicial Council Coordinating Proceeding, No. 4176 (Slip Op., September 13, 2001).

agreement forms, which we “pre-approved” in D.01-06-015 and D.01-07-031. One form for gas-fired QFs was made available to NP Cogen. For reasons unique to its project, NP Cogen was unwilling to enter into a settlement under the same terms and conditions approved in these decisions. Edison and NP Cogen resumed negotiations and on September 27, 2001, reached the Settlement Agreement that is the subject of this application by Edison. Under a standstill provision in the Settlement Agreement, NP Cogen’s appeal is currently stayed.

On November 21, 2001, Edison filed this application for our approval of the Settlement Agreement. Accompanying its application, Edison filed a motion for a protective order to preserve the confidentiality of certain portions of the application, and a motion to shorten time for filing responses.

Edison filed public versions of its application, the power purchase QF contract between Edison and NP Cogen, prepared testimony of Edison’s manager of the QF contract section, and the complaint filed by NP Cogen against Edison in Los Angeles Superior Court. Edison also filed non-public versions of its application, the testimony of its manager, and the Settlement Agreement between Edison and NP Cogen. The non-public versions of the application and the testimony include confidential information on the reasonableness of the negotiations and benefits of the Settlement Agreement to ratepayers.

Edison’s states that the Settlement Agreement will result in the dismissal of pending litigation, and will resolve all outstanding issues between the parties concerning Edison’s suspension of payments to NP Cogen for energy delivered during the period November 1, 2000 through March 16, 2001, and NP Cogen’s cessation of energy deliveries as of March 16, 2001. Edison’s application requests

an expedited approval since the settlement will terminate on January 25, 2002, if Commission approval is not obtained, with a potential resumption of litigation.³

Edison's motion to shorten time requested that responses be due December 6, 2001, rather than December 21, 2001. The Office of Ratepayer Advocates (ORA) opposed shortening time as Edison had requested, and the assigned Administrative Law Judge (ALJ) shortened time by only two days to December 19, 2001, however, no opposition or responses to Edison's application were filed. By ruling dated January 17, 2002, the assigned ALJ granted Edison's motion for a protective order.

Edison's states that although NP Cogen was unwilling to enter into a settlement on the same terms and conditions in agreements approved in D.01-06-015 and D.01-07-031, this Settlement Agreement has many provisions including payment for past energy deliveries, which are nearly identical to the agreements approved by the Commission in these decisions. Edison seeks Commission approval of the terms of the Settlement Agreement as reasonable, and authorization to recover all payments made or to be made by Edison to NP Cogen subject only to Edison's prudent administration of the Settlement Agreement and the NP Cogen contract. Edison also seeks Commission confirmation that the payments and other benefits to be received by NP Cogen under the Settlement Agreement are in lieu of and replace in their entirety such orders as the Commission may have issued, or will issue, requiring Edison to

³ The Settlement Agreement provides it shall terminate by January 25, 2002, if "Commission Approval" as defined in the agreement is not obtained or waived by Edison by that date. Edison proposed a 15-day extension to February 9, 2002, a date that has passed.

make payments to NP Cogen for deliveries during the period November 1, 2000 through March 16, 2001.

Settlement Agreement

According to the public version of Edison's application, the terms and conditions of the Settlement Agreement are described in Exhibit SCE-2 that was filed under seal. Neither the public nor non-public versions of the testimony discuss the terms of the settlement. Instead, the public version of the prepared testimony discusses the QF contract, the litigation, and a brief description of negotiations. The non-public version of the prepared testimony and the application discuss the benefits of the Settlement Agreement and why Edison believes the Settlement Agreement is reasonable.

In order to determine terms and provisions provided in the settlement, we reviewed the non-public versions of the application, the prepared testimony, and the Settlement Agreement, as well as the QF contract and the complaint filed in Los Angeles Superior Court. The following discussion of the issues is based on our review of the Settlement Agreement, and all of the other pertinent documents.⁴

Discussion

The Commission's settlement and stipulation rules are found in Rules 51 to 51.10 of the Commission's Rules of Practice and Procedure.⁵ The settlement

⁴ We note that the protective order does not inhibit our staff from reviewing non-public portions of the record; moreover, other persons, such as those who might have wanted to protest the application, may obtain access to the confidential information by executing a nondisclosure agreement.

⁵ All references are to the Commission's Rules of Practice and Procedure unless otherwise noted.

rules provide a standard for review of this settlement. Specifically, Rule 51.1(e) provides in pertinent part that the Commission will not approve a settlement unless the “settlement is reasonable in light of the whole record, consistent with law, and in the public interest.” We review the proposed settlement between Edison and NP Cogen with that criterion in mind.

We have reviewed the QF contract, the circumstances leading to the settlement, as well as the terms of the proposed Settlement Agreement. The reasonableness of the Settlement Agreement is based on (1) the terms and conditions of payment for energy provided during the payment suspension period, and (2) the potential risks associated with litigation. This agreement is different from other QF agreements and amendments we have approved because it anticipates contract termination rather than contract continuation.⁶ However, while unique in this aspect, our review of the terms and conditions for Edison’s payments for energy and capacity previously delivered shows that these payments will be essentially the same as the contract amendments we approved in D.01-06-015 and D.01-07-031. Furthermore, a financial analysis indicates that the net-present-value of expected cost benefits to ratepayers is equal to, or exceeds, expected costs as a result of the settlement, and thus the settlement is in the public interest. Based on our knowledge of QF contracts and amendments, and the negotiations between utilities and QFs regarding suspension of payments, Edison’s proposed payment provisions are a reasonable resolution of this issue.

⁶ We note that the NP Cogen contract expires in about two years, further reducing the viability of NP Cogen continuing to operate as a QF.

Litigation risk is not as easily weighed as the results of a financial analysis. Litigation risk includes not only direct monetary impacts from monies owed and from potential consequential damages, but also indirect impacts that might affect existing contracts and continuing negotiations with other QFs. Thus, in our approval of this settlement, we consider not only the potential impacts of continued litigation between Edison and NP Cogen, but also the potential implications of future litigation between Edison and other QFs. Based on the issues resolved by the settlement, the litigation risks that Edison could be exposed to if these issues and the dispute were litigated, here, and in potential future litigation with other QFs, we conclude that the proposed settlement is reasonable, consistent with the law, and in the public interest. Accordingly, the Settlement Agreement entered into between Edison and NP Cogen should be approved. Consistent with Rule 51.8, this settlement is not precedential and does not constitute approval of any principle or issue in future proceedings.

We turn next to the issue of cost recovery. Edison requests that it should be authorized to recover in rates all payments that it will make to NP Cogen under the Settlement Agreement through Edison's Annual Transition Cost Proceeding (ATCP) or successor mechanism, subject only to Edison's prudent administration of the Settlement Agreement and the NP Cogen contract. The ATCP was established in D.97-06-060,⁷ as part of the establishment of the transition cost balancing accounts. The reasonableness of the QF contract administration is to take place in the ATCP, to the extent that such reviews have not been eliminated by the standard offers or other approved contracts.⁸

⁷ D.97-06-060, 72 CPUC2d 736 at 770 and 790.

⁸ D.97-11-074, 76 CPUC2d 627 at 713 and 740.

Since we have approved the settlement terms and conditions, we authorize Edison to recover in rates all payments that it will make to NP Cogen pursuant to the Settlement Agreement through Edison's ATCP, or any other successor mechanism, subject only to Edison's prudent administration of the Settlement Agreement and the contract between Edison and NP Cogen.

Since this matter is uncontested, and this decision grants the relief requested, the comment period is waived as provided for in Rule 77.7(f)(2).

Findings of Fact

1. Edison and FPB Cogeneration, Inc., NP Cogen's predecessor, entered into an Interim Standard Offer No. 4 QF contract on May 21, 1984, with a term of 20 years.
2. NP Cogen provides Edison with firm capacity under the contract.
3. Edison suspended payments to NP Cogen for the period from November 1, 2000 through March 16, 2001, when NP Cogen ceased operating its project.
4. NP Cogen provided written notice on March 19, 2001, that it was canceling its contract with Edison.
5. The terms of the settlement between Edison and NP Cogen are memorialized in the Settlement Agreement that was filed under seal.
6. The Commission has reviewed the QF contract, the circumstances leading to the settlement, and the terms and conditions of the proposed Settlement Agreement.
7. The conditions and provisions for energy and capacity payments of the settlement are similar to those approved in D.01-06-015 and D.01-07-031.
8. A financial analysis of the net-present-value of expected cost benefits to ratepayers is equal to, or exceeds, costs as a result of the settlement.

9. Edison should be authorized to recover all payments made to NP Cogen under the Settlement Agreement and the power purchase agreement between Edison and NP Cogen through Edison's ATPC, or any other successor mechanism, subject only to Commission review of the reasonableness of future administration of the agreements.

Conclusions of Law

1. Persons interested in the proposed settlement of issues between Edison and NP Cogen were provided with notice of Edison's Application by virtue of the notice of the Application's filing in the November 28, 2001 Daily Calendar.

2. Several of the settlement and stipulation rules do not apply to the proposed settlement at issue in this proceeding and should be waived because the settlement agreement was entered into before the application was filed.

3. Rule 51.1(e) should be used to review the proposed settlement agreement because that rule sets a standard that provides guidance for evaluating a proposed settlement.

4. The terms of the proposed settlement of the issues and dispute between Edison and NP Cogen are reasonable, consistent with the law, and in the public interest.

5. The Settlement Agreement entered into between Edison and NP Cogen should be approved.

6. Consistent with Rule 51.8, this settlement is not precedential and does not constitute approval of any principle or issue in future proceedings.

7. The terms in the Settlement Agreement shall be in lieu of and replace any orders that the Commission has issued or may issue requiring Edison to make payments to NP Cogen for past deliveries that are different from or in addition to those established in the Settlement Agreement.

8. This order should be effective today in order to allow the Settlement Agreement to be implemented immediately.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company's (Edison) November 21, 2001 application to approve its settlement agreement with NP Cogen, Inc. (NP Cogen) is approved.

2. Edison is authorized to recover in rates all payments that Edison will make to NP Cogen, under the Settlement Agreement through Edison's Annual Transition Cost Proceeding or any other successor mechanism, subject only to Edison's prudent administration of the Settlement Agreement and the contract between Edison and NP Cogen.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.